Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

CASE NO. 88-1383

in the
Supreme Court
of the
United States of America

October Term, 1988

BRUCE ROTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

William VanDercreek
300 Crescent Court, Suite 700
Dallas, TX 75201
(214) 855-3700
Counsel of Record for Petitioner

TABLE OF CONTENTS

Jurisdiction 1

Argument 2

Conclusion 4

TABLE OF AUTHORITIES

Cases:

United States v. Garcia
517 F.2d 272 (5th Cir. 1975) 3

Wheat v. United States
108 S.Ct. 1692 (1988) 2, 4

In the Supreme Court of the United States of America
October Term, 1988

BRUCE ROTH, Petitioner,

vs. Case No. 88-1383

UNITED STATES OF AMERICA, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

Jurisdiction

This is a criminal case that was docketed by the Clerk's Office within the permissive limits of Supreme Court Rule 20.1. Jurisdiction exists under 28 U.S.C. § 1254(1).

Argument

Petitioner and the government agree that a district judge must conduct a hearing once a conflict between an attorney and his client becomes evident. Govt. Br. at 6. The parties disagree whether an acknowledged conflict which prevented Petitioner's trial attorney from representing him for plea bargain requires the district court to balance the relevant interests as was done in *Wheat v. United States*, 108 S.Ct. 1692 (1988).

The *Wheat* case holds that a district judge has the discretion to reject a knowing and intelligent waiver of a conflict even if that rejection results in denying a criminal defendant his counsel of choice. An inescapable corollary of this holding is that it would be an abuse of discretion to accept a waiver in a case of obvious or outrageous conflict. A further implication of the *Wheat* decision is that a district judge must conduct an inquiry of sufficient depth to assure that the judge has enough information to properly exercise the discretion approved in *Wheat*.

Plea bargaining, the offering to cooperate with the government in the hopes of receiving a lesser sentence, is an integral aspect of the criminal justice system. Perhaps it should be non-waivable, but it certainly should not be waived unless the trial court expressly balances the relevant interests as was done in *Wheat*. In the case at bar, acceptance of Petitioner's waiver without balancing the interests was an abuse of discretion. The government's Brief in Opposition does not address Petitioner's claims, stating only that refusal to accept the waiver "does not by any means indicate that the court's decision . . . was error." Govt. Br. at 7.

The impact of the acknowledged conflict on plea bargaining was manifest in this case. The government claimed throughout the proceedings below that Petitioner was obviously guilty. This position was clearly adopted by the appellate court. Pet. App. 1-6. Accepting the government's claim and the appellate court's conclusion at face value, it is apparent that Petitioner needed the close assistance of counsel regarding a possible plea. While the plea required the

admission of guilt, it also represented an opportunity for Petitioner to minimize punishment, possibly cooperate with the government, and show rehabilitation. Even though Petitioner was a trained criminal lawyer, he could not conduct plea negotiations with the government on his own; he was dependent upon his attorney to negotiate with the government and to inform the Petitioner of his options. Yet, it was exactly in this area that trial counsel admitted conflict and refused representation. Pet. App. 28.

Of further significance is the admission of trial counsel to other potential yet real conflicts which were not explained and about which the Court did not require any elaboration. Pet. App. 28. The Court had no way of knowing whether Petitioner was aware of these admitted conflicts because no inquiry was conducted. As the Fifth Circuit observed in *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), a defendant must at least "understand the details of his attorney's possible conflict of interest and the potential peril of such a conflict." Govt. Br. at 6. This standard was not met. The District Court's failure to inquire further despite trial counsel's admissions was error which requires reversal; the Seventh Circuit's failure to recognize the scope of *Wheat* justifies a decision to grant certiorari to clarify this important segment of the conflict rules.

The position of the Seventh Circuit (Pet. App. at 12-13) and the Solicitor General (Govt. Br. at 6) is that if a defendant is a lawyer, no balancing of rights or interests is needed. To the contrary, a lawyer often

needs advice about his personal legal affairs more than a layman. Certainly in this case, had Petitioner received conflict free advice, he might well have struck a deal with the government. At the very least, Petitioner would have changed trial counsel had he then known about the conflicts that he discovered later. Pet. App. at 44-47.

Finally, the government claims that there is no conflict among the Circuits sufficient to justify the attention of this Court. A careful reading of the cases cited by Petitioner indicates the contrary. It is essential that the scope question be resolved and that the practice of the district courts regarding conflict hearings be made uniform. Virtually every criminal case presents an issue of whether to plea bargain. the conflicts and problems are of substantial public importance.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

William VanDercreek
Attorney for Petitioner
300 Crescent Court, Suite 700
Dallas, TX 75201
(214) 855-3700